LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 31 1953
HAROLD B. WILLEY, Clerk

No. 217.

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

SUPERIOR FILMS INC.,

Appellant,

vs.

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT,

Appellee.

BRIEF OF APPELLEE.

C. WILLIAM O'NEILL,
Attorney General, State of Ohio,
ROBERT E. LEACH,
Chief Counsel,
GWYNNE B. MYERS,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC. Columbus 15, Ohio

INDEX.

Opinion below 1
Statement of the case 2
The statutes involved 2
Questions presented 3
Summary of argument 3
Argument 6

Point I—A state may, consistent with the Fourteenth Amendment, subject motion pictures to the requirement of a license prior to their exhibition within the state 6

Point II—Ohio's licensing system, which permits rejection of those motion pictures which are obscene, immoral or which tend to promote crime or riot, is consistent with the protection accorded motion pictures by the Fourteenth Amendment 9

A. Ohio's licensing system permits denial of a license only when a motion picture is adjudged to be obscene, immoral or as tending to promote crime or riot 9

1. Construction of the statute 9

2. The power to revoke a license is limited by the standard of "obscene, immoral or tends to promote crime or riot" 10

B. The impact of the motion picture upon the community's interest in protecting itself from immorality, crime or riot is so great as to justify the narrow restriction imposed upon it 11

C. The limitation on freedom of motion pictures may be constitutionally enforced by the denial of a license to motion pictures which are obscene, immoral or which tend to promote crime or riot 21

Point III—The standards upon which the Ohio licensing system is based are sufficiently definite to satisfy the requirements of due process under the Fourteenth Amendment to the United States Constitution 31

Point IV—The license fee provided for by Ohio law does not constitute as to this appellant an unconstitutional tax upon the right to exhibit or distribute motion pictures 36

A. The court below properly estopped appellant from asserting the invalidity of the license fee in this action and this Court has no jurisdiction of that question for the reason that the judgment of the Supreme Court of Ohio is based upon an adequate and independent nonfederal ground 36

B. In any event, the fee provided by Ohio law is a license fee, not a tax, and if the right to license exists, the right to the fee is corollary thereto 37

C. Even if the fee provided by Section 154-47 be characterized as an unconstitutional tax, that provision is severable and its failure does not affect the validity of the licensing system 39

Conclusion 41

Cases Cited.

Baldwin v. Missouri, 281 U. S. 586 25
Beauharnois v. Illinois, 343 U. S. 250 ..... 21, 25, 28, 41
Burstyn v. Wilson, 343 U. S. 495 ..... 3, 6, 7, 8, 29, 31, 32
Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210 40
Chaplinsky v. New Hampshire, 315 U. S. 568 25
Clark v. Paul Gray Inc., 306 U. S. 583 39
Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336 ..... 18, 21
Communications Association v. Douds, 339 U. S. 382 ..... 8, 22, 24
Cox v. New Hampshire, 312 U. S. 569 7
Davis v. Beason, 133 U. S. 333 ..... 8, 25
Dennis v. U. S., 341 U. S. 494 ..... 8, 21, 23, 28
Dumont Laboratories v. Carroll, 340 U. S. 929 27
Eilenbecker v. District Court, 134 U. S. 31 39
Feiner v. New York, 340 U. S. 315 25
Fox v. Washington, 236 U. S. 273 ..... 8, 25
Gelling v. Texas, 343 U. S. 960 10
Gitlow v. New York, 268 U. S. 652 23
Globe Security & Loan Co. v. Carrel, Aud., 106 O. S., 43 37
Herbert v. Louisiana, 272 U. S. 312 10
In Re Summers, 325 U. S. 538 ..... 8, 25
Jacobson v. Mass., 197 U. S. 30 25
Kovacs v. Cooper, 336 U. S. 77 ..... 8, 9
Kunz v. N. Y., 340 U. S. 290 25
Mutual Film Co. v. Industrial Comm. of Ohio, 236 U. S. 230 ..... 4, 29, 31, 32

National Broadcasting Co. v. U. S., 319 U. S. 190 ... 26, 34
Reynolds v. U. S., 98 U. S. 145 ... 8, 25
Saia v. New York, 334 U. S. 558 ... 10
Southwestern Oil Co. v. Texas, 217 U. S. 114 ... 40
Sproles v. Binford, 286 U. S. 374 ... 35
State on Application of Alter v. Bader et al., 56 O. S. 718 ... 36
United Public Workers v. Mitchell, 330 U. S. 75 ... 23, 24
Winters v. New York, 333 U. S. 507 ... 10, 13, 28, 33

Statutes Cited.

United States Code—
18 U. S. C. 552 ... 34
18 U. S. C. 1462 (a) ... 34
19 U. S. C. 1305 ... 34
47 U. S. C. 307 (a) ... 26
47 U. S. C. 312 (a) ... 26
47 U. S. C. 326 ... 25
Ohio General Code (Revised Code)—
154-47 (3305.01 R. C.) ... 37
154-47a (3305.03 R. C.) ... 37
154-47b (3305.04 R. C.) ... 10
154-47d (3305.08 R. C.) ... 28
154-47h (3305.07 R. C.) ... 35
486-17a (143.27 R. C.) ... 34
1261-1b (6111.01 R. C.) ... 34
12075 (2723.01 R. C.) ... 36
13040 (2905.40 R. C.) ... 33
McKinney's Consol. Laws N. Y. Ann. Educational Law, A.3, Sec. 126 ... 18, 39
Purdon's Penn. Stat. Ann. T.4, Sec. 46 ... 18, 39

England
Cinemagraph Act 1909, 9 Edw. 7, c. 30 18
Cinemagraph Act 1952, 15 and 16 Geo. 6 and 1 Eliz. 2, c. 68 18
Canada
Province of Ontario, The Theatres Act, 1953, 2 Eliz. II, c. 104 19
Australia
Customs Act 1901-1953 18
Statutory Rules 1932 No. 24 as amended by Statutory Rules 1945 No. 125 and Statutory Rules 1949 No. 17 18

Other Authorities Cited.

Blumer, Henry, Movies and Conduct, Payne Fund Studies 13, 14, 18
Blumer and Hauser, Movies, Delinquency and Crime 17
Board of Censors of Motion Pictures, Province of Ontario, Report of May 1-May 31, 1951 29
Bulletin, 100th General Assembly, State of Ohio, Twentieth (Final) Edition 27
Charters, W. W. Motion Pictures and Youth 12, 13, 14
Commonwealth Film Censorship (Australia), Statement July 1951 29
Departments of the Army and Navy, Instructional Film Research 1918-1950, Technical Report No. SDC 269—7-19 ..... 14, 15
Flick, Dr. Hugh M., "Talk with a Movie Censor", The Saturday Review, Nov. 22, 1952 19
Forman, Henry James, Our Movie Made Children 17
Handel, Leo A., Hollywood Looks at Its Audience 12, 13, 14

Inglis, Ruth A., Freedom of the Movies 21
Mitchell, Alice Miller, Children and Movies 13
Motion Picture Production Code 29, 34
Opinions of the Attorney General, State of Ohio, 1950, No. 1463 10
Powdermaker, Hortense, Hollywood The Dream Factory 19
Quigley, Martin, Decency in Motion Pictures 11, 14
Radio Censorship and the Federal Communications Commission, Note, 39 Col. L. Rev. 447 26
Seldes, Gilbert, The Great Audience 12
2 Sutherland, Statutory Construction (3rd Ed.) 40
The Film Daily, July 7, 1952 19
The Film Daily Yearbook, 1953 ..... 12, 19

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 217.

SUPERIOR FILMS INC.,

Appellant,

vs.

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT,

Appellee.

BRIEF OF APPELLEE.

OPINION BELOW.

The majority and the dissenting opinions in the Supreme Court of Ohio are reported in 159 O. S. 315, 112 N. E. 2d 311, and appear at R. 56 to 70.

STATEMENT OF THE CASE.

The statement submitted by appellant beginning at page 2 of its brief is a correct presentation of the case. Appellee believes that the following additional facts are worthy of note:

1. The Division of Film Censorship reviewed "M" not once, but four separate times, the last review being held before the Advisory Board of Film Censorship. (R., 17, 22 and 23)

2. During the course of the movie two murders of very young girls occur and a third is attempted. The murder of another character is actually presented.

3. Three times the action of the movie centers on the main character luring small girls to accompany him.

4. The main character appears in innumerable shots with his hands covered with blood (his own) and throughout the final scenes quite clearly shows the effects of a brutal beating. At this point his face is blood smeared and one eye appears, at best, to be seriously damaged. At the same point in the movie a mob scene of the most hysterical sort occurs during which the main character is again beaten.

5. Though some will undoubtedly view "M" in the constructive light developed by appellant, appellee believes it a fair statement that the great majority of the total audience would retain largely the impact of violence, depravity, brutality and crime.

THE STATUTES INVOLVED.

The statutes involved in this case are Ohio General Code Sections 154-47 to 154-47i inclusive and are set out in full in Appendix A to appellant's brief.

QUESTIONS PRESENTED.

1. Can a state, consistent with the Fourteenth Amendment to the United States Constitution, subject motion pictures to a licensing system prior to their exhibition within the state?

2. If so, is the licensing system provided for by Ohio law consistent with the protection accorded motion pictures by the general principle of a free press applied as to the states by the Fourteenth Amendment to the United States Constitution?

3. If so, are the standards of the licensing system provided for by Ohio law definite enough to be consistent with the Fourteenth Amendment to the United States Constitution?

4. If so, does the license fee provided for by Ohio law constitute as to this appellant an unconstitutional tax upon the right to exhibit or distribute motion pictures?

SUMMARY OF ARGUMENT.

Appellee's position is anchored in the proposition that this Court in its decision of **Burstyn v. Wilson**, 343 U. S. 495, permitted a state to protect certain vital and narrow social interests by a system of licensing motion pictures prior to their exhibition within the state. This permission finds its justification in reason by an objective appraisal of the unique impact of the motion picture upon social and moral order. Its justification historically is founded upon the long established and often repeated recognition by this Court that the freedom protected by the Fourteenth Amendment is not absolute, but varies as the expression, the place, the time, the manner of regulation, and the impact of the medium of communication varies.

Within this permissible area Ohio has sought to protect its citizens from a devastating attack upon the social and moral order of the state. This attack may take place in a thousand theatres, in every community of the state on any given day. It may fall upon an unrestricted audience of thousands of old or young, criminal or demented, callousedor highly impressionable. It falls with an impact achieved by no other medium and approached by few. The scope of the protection erected by Ohio is limited to that which is obscene, immoral or that which tends to promote crime or riot. Thus appellee's position is simply put: The impact of the motion picture, the unrestricted audience, and the subject matter of those films which may be rejected—considered in combination, present an area of danger which Ohio as a state has constitutionally regulated.

The standards of the Ohio statute were approved by this Court in **Mutual Film Co. v. Industrial Comm. of Ohio**, 236 U. S. 230. The basis for that approval was that these standards were found to get precision from the sense and experience of men and therefore did not leave decision to arbitrary judgment. The court has repeatedly utilized these standards as a yardstick to measure indefiniteness in other cases. In construing the licensing statute, the Supreme Court of Ohio assiduously followed this Court's lead and held that the sense and experience of forty years of administration had given the statute a definite and circumscribed meaning. 159 O. S. 315 at 332, (R., 67). Only such motion pictures as are obscene, immoral or which tend to promote crime or riot may be refused a license. These are standards which have acquired definiteness through forty years of interaction by court and administrator. They narrowly circumscribe the area of regulation, and consistent with due process of law furnish the reviewing court a spe-

cific frame of reference by which the administrative action may be judged.

The question of the tax or license characteristics of the license fee is regarded as a separate and collateral question. At the outset this Court lacks jurisdiction of this portion of the appeal for the reason that the judgment of the Supreme Court of Ohio upon this question is based upon an adequate and independent non-federal ground—an estoppel against appellant preventing him from raising the constitutional question. In any event it would be most unusual for this Court to overturn the Supreme Court of Ohio's determination that the total governmental expense of operation approximated the total income derived from the license fee. Even if the challenge is successfully made, the fee provisions stand alone and can be stricken without affecting the rest of the statute.

Essentially we have this—the Ohio legislature for nearly half a century has repeatedly considered the licensing system in question a vital and necessary exercise of the police power. The statute during that time has had a relatively settled administration within the rules established by this Court and the Supreme Court of Ohio. When those rules changed following the **Burstyn** decision, the administrative agency and the Supreme Court of Ohio conformed to the narrow limitations there expressed. Within these limitations the motion picture film "M" was reviewed four times by the agency and that review in turn submitted to the Supreme Court of Ohio. In the light of the unique threat of the medium, due process should not compel more.

ARGUMENT.

POINT I.

A State May, Consistent With the Fourteenth Amendment, Subject Motion Pictures to the Requirement of a License Prior to Their Exhibition Within the State.

In **Burstyn v. Wilson**, 343 U. S. 495 the validity of this proposition was placed squarely before this Court. That decision, it appears to appellee, held (1) that motion pictures are entitled to the protection generally accorded the press by the Fourteenth Amendment, but while the protection is similar to that accorded the press it also varies from that; (2) that a motion picture could not be denied a license for the reason that it was "sacrilegious". That decision did not enjoin all attempts to license motion pictures. On the contrary it recognized, though it did not define, the area of proper limitation of the freedom granted. If this is not the effect of that decision why did the Court place its decision on the "sacrilegious" standard? This Court obviously intends to speak as clearly as the case presented permits. In the **Burstyn** case, the Court could not have reached consideration of the "sacrilegious" standard if the licensing of motion pictures were **per se** objectionable. Indeed Mr. Justice Clark, writing for the Court at page 502 of the opinion in that case said:

> "It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Each method tends to present its own peculiar problems."

and again at page 504 referring to and recognizing that prior restraints on motion pictures may exist:

> "In the light of the First Amendment's history and of the **Near** decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."

To what limitation were these remarks directed? Admittedly the state has a heavy burden, but if that burden is sustained then the limitation challenged there—the licensing system—would be upheld. Even again the Court refers to a permissible licensing system as being a,

> "narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society." p. 504

See also footnote 20 at p. 506 indicating recognition by the Court of an area which the state may protect. Mr. Justice Reed concurring in the judgment said at page 506:

> "Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine whether the principles of the First Amendment have been honored."

This recognition of the area of permissible protection was not a novel approach to the problem of freedom of expression. It reaffirms that which was corollary to the right at birth. Freedom of expression is always limited by those substantial interests of society deserving of more or equal protection. This approach was generalized by Chief Justice Hughes in **Cox v. New Hampshire**, 312 U. S. 569 at 574:

> "Civil Liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

There is an apparent continuity in this Court's recognition of the limitations which freedom must observe. **Reynolds v. United States**, 98 U. S. 145; **Davis v. Beason**, 133 U. S. 333; **Fox v. Washington**, 236 U. S. 273; **Chaplinsky v. New Hampshire**, 315 U. S. 568; **In Re Summers**, 325 U. S. 538; **Kovacs v. Cooper**, 336 U. S. 77; **Communications Association v. Douds**, 339 U. S. 382; **Dennis v. U. S.**, 341 U. S. 494.

Of course there is also a continuity in this Court's prohibition of prior restraints upon newspapers, periodicals and books. But as Justice Frankfurter said concurring in the decision of **Kovacs v. Cooper**, supra, at p. 96:

> "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated."

Or as Justice Jackson said concurring in the same decision at p. 97:

> "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, value, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is a sound truck."

The rules are determined by that to which they must be applied. As recognized in the **Burstyn** decision the motion picture is similar to the newspaper or the book only in being a form of expression. The dissimilarities are manifold. In another portion of this brief (Point II B) these dissimilarities and their impact are discussed extensively. This impact of this particular medium of expression justifies this Court in holding as it has that the area of permissible license of motion pictures does exist.

POINT II.

Ohio's Licensing System Which Permits Rejection of Those Motion Pictures Which Are Obscene, Immoral or Which Tend to Promote Crime or Riot is Consistent With the Protection Accorded Motion Pictures by the Fourteenth Amendment.

A. Ohio's Licensing System Permits Denial of a License Only When a Motion Picture is Adjudged to be Obscene, Immoral or as Tending to Promote Crime or Riot.

1. Construction of the Statute:

In the argument and briefing of this case before the Supreme Court of Ohio administrative experience under the statute was reviewed. That Court interpreting that experience and its own in the cases which had come before it came to this conclusion:

> "Furthermore, the tests of the censorship statute have over a period of over 40 years acquired a **definite** and **circumscribed** meaning.
>
> As is stated in defendant's brief, 'the standards have enjoined the obscene, the immoral, and that which tended to promote crime or riot, judged in relation to the impact and the audience.'" (Emphasis added) 159 O. S. 315 at 332.

This was the Court's binding summary of what the statute included and what it did not include. The Court was giving voice to the precision which flows from the sense and experience of men. As was said in **Kovacs v. Cooper**, 336 U. S. 77 at 84 and 85:

> "Although this Court must decide for itself whether federal questions are presented and decided, we must

accept the state court's conclusion as to the scope of the ordinance." citing among other decisions **Saia v. New York**, 334 U. S. 558 and **Winters v. New York**, 333 U. S. 507, 514.

The Supreme Court of Ohio has construed the statute and the decision of this case must be based upon the statute as construed. **Herbert v. Louisiana**, 272 U. S. 312, 317.

2. The Power to Revoke a License is Limited by the Standard of "Obscene, Immoral or Tends to Promote Crime or Riot".

Appellant contends (Point II, B; p. 31 Appellant's Brief) that the power to revoke a motion picture license provided for by Section 154-47b, Ohio Gen. Code, is unlimited. In effect, if this were so, the Ohio statute would fall before the decision of **Gelling v. Texas**, 343 U. S. 960. In fact this is not a case where the power of revocation has been exercised, nor to counsel's knowledge has the power ever been exercised. Be that as it may, **the power of revocation is limited exactly by the original test for the grant or denial of a license.** Only those motion pictures which are obscene, immoral or which tend to promote crime or riot are subject to license revocation.

The Attorney General of Ohio in an unappealed and therefore unreversed opinion, 1950 A. G. Opns. No. 1463, has said at page 84:

> "It is true that Section 154-47b also provides that the department of education is authorized to recall any film for recensoring or to revoke any certificate permitting the exhibition of any film in the state of Ohio whenever, in the judgment of the department of education, the public welfare requires it. Can it be said that the legislature intended to place greater powers in the hands of the department in matters of revocation than it has relative to approval in the first instance?

> I think not. Clearly it was the intent of the legislature when granting such powers of revocation that said powers would only be invoked if there was a change in the film itself and that such changes would cause the film to become immoral, non-educational or non-amusing and of a harmful character."

The power of revocation therefore neither adds nor detracts and we return whence we have come. The act must stand or fall on the original standard, as spelled out by the Court below, of "obscene, immoral or tends to promote crime or riot."

B. The Impact of the Motion Picture Upon the Community's Interest in Protecting Itself From Immorality, Crime or Riot is so Great as to Justify the Narrow Restriction Imposed Upon It.

Ohio's interest in the exhibition of motion pictures begins with an appreciation of the impact of the medium. A motion picture is not action reduced to black print on white paper. Nor is it like a picture which, though it presents on paper one or more ideas, achieves its real effect in the imagination which it stimulates. Nor is it like the spoken word which depends upon the hearer to form the picture it describes. It does not relate what has occurred as does the newspaper. It does not describe action as does the book or magazine. **It is.** It is the action. The viewer is drawn within and lives in the drama. Presented in a darkened theatre, with a musical background and the tense awareness of the crowd about one, it engulfs. Who has watched a motion picture without for the time of the exhibition becoming a part of that which he observed? The impact of the movie is quite different from that of a book, or a newspaper, or a speech.[1] The motion picture is a

[1] See the excellent contrast drawn in Martin Quigley, Decency in Motion Pictures, pp. 60, 61.

complex combination of these things which achieves a titanic impact on the viewer. The impact is, in fact, unique, and the interest of the state in the medium must be likewise.

This tremendous impact is brought to bear upon and combined with an unrestricted audience. Aside from its tremendous size,[2] one third of that audience is under the age of 18.[3] The only thorough study of youth attendance of motion pictures was made in the early thirties by Edgar Dale of Ohio State University. Apparently these studies are still reliable.[4] At that depressed time when movie attendance was slipping even more than today Dale estimated that 11,000,000 children under the age of 14 were attending movies weekly. This estimate rose to 28,000,000 if all minors were considered.[5] In Ohio alone 16,750 boys and girls in the primary grades attended 7,008 times a week, and the 35,453 boys and girls in grades four to twelve attended 35,155 times a week.[6] A more recent survey in New York by the Motion Picture Research Bureau showed that 43% of the age group 10-24 attended the motion pictures over four times a month.[7] This substantial proportion of the young population is life and death for the movie industry.[8] It does not take great imagination to predict a profit and loss statement for the movies were this audience moved.

Mere youth is not the only attribute of the unrestricted audience. No one with the price of admission is barred. The good, the bad, the killer, the demented, the pervert, the impressionable, the thrill seeker sit side by side. In

---

[2] 45,000,000 average weekly attendance for 1952, The Film Daily Year Book 1953, p. 127.

[3] Ibid: 10% 5 to 11 years; 20% 12 to 17 years; 35% 18 to 30 years.

[4] Reported in W. W. Charters, Motion Pictures and Youth, pp. 46, 47, and Leo A. Handel, Hollywood Looks at Its Audience, pp. 108.

[5] Charters, Motion Pictures and Youth, p. 47.

[6] Handel, Hollywood Looks at Its Audience, p. 109.

[7] Ibid. at p. 103.

[8] Gilbert Seldes, The Great Audience, p. 12.

fact the movies may attract more of the abnormal. Surveys have clearly indicated that the delinquent juvenile will seek the impact of the motion picture many more times than others in his non delinquent age group.[9] The quirks of those in your "row" may run the gamut of psychiatry. This audience sees the same movie, eats the same popcorn, but **the reaction to the impact is entirely diverse.** "What is one man's amusement, teaches another's doctrine." **Winters v. New York**, 333 U. S. 507. Equally, that which leads one to artistic satisfaction leads another to violent crime, another to adultery.

What of the effect of the impact upon this audience? Much of the research in this field has been done among the young, but again, what will affect one may not have exactly the same effect upon another, but will surely register upon one as impressionable. The fact that basic attitudes may be changed and action induced by motion pictures is universally reported.[10] The vividness of the medium and its

---

[9] Alice Miller Mitchell, Children and Movies, pp. 134, 142, 143; Charters, Motion Pictures and Youth, p. 13.

[10] Charters, Motion Pictures and Youth, p. 9—"Children of all ages tend to accept as authentic what they see in the movies. Thus pre-tests on general information were given to groups and their scores were computed. Then equated groups viewed pictures in which were shown the errors of fact which had been covered in the pre-tests. The two sets of scores were compared and it was found that at each of the three age levels the incorrectly shown items had left their marks. The children had increased their fund of knowledge on the correctly shown items covered by the test, but their acceptance of the incorrect items as correct had lowered their improvement in their total scores. They tended to accept the errors as facts. In general 'children accept the information in the movies as correct unless it is flagrantly incorrect'."; p. 20—"The outstanding contribution of the study is the establishment of the fact that the attitude of children toward a social value can be measurably changed by one exposure to a picture." The statistical analysis from p. 20 to 31 is particularly illuminating. Mitchell, Children and the Movies, p. 142—"The findings of this study show that the delinquent child's contact with the movie far exceeds that of other children. His active interest in it is apparently a protest against the bareness and drabness of his own life. That which for various causes has been denied him he naturally seeks. The movie is all about him. It is one of the factors and perhaps the most conspicuous factor within reach which helps him to fill the emptiness of his life. In it he thinks that he finds the 'real stuff' even though they be only screen shadows of the things

extraordinary capacity for conveyance of thought and emotional stimulus make it the most effective of all expression, with the concomitant dangers involved in its abuse. As Quigley points out at p. 5 of **Decency in Motion Pictures**,

> "The nature of the film permits of manifold duplication for exhibition simultaneously at many places, the accessibility of the motion picture theatre, in location and in admission price, contribute toward the creation of an instrument of unique moral and social effect. Of especial importance is the unparalleled appeal of the motion picture to the youth who are in the most impressionable years of life, hungry for experience, real and vicarious. It cannot be denied that to these the motion picture readily and effectively conveys impressions which are **formulative as to character and directive as to conduct.**" (Emphasis added)

The effect of repeated abduction of children can lead the susceptible to imitation.[11] The effect can lead to readiness to surrender the ordinary inhibitions.[12] Violence leads to violence.[13] Attitudes and values undergo definite changes.[14]

> "There exists today no means of influencing the masses more potent than the cinema." Pius XI: Encyclical Vigilante Cura (1936).

Thus the impact and its effect.

---

for which he searches." Herbert Blumer, Movies and Conduct, Payne Fund Studies, p. 126, "By skillful and dramatic presentation which grasps the attention of the observer and plays upon his impulses, motion pictures seem able to lessen reflective judgment and ordinary self-control, to stir impulses and facilitate their expression . . . The individual is so preoccupied with the picture that its imagery becomes his own. The impulses, which correspond to the images, are called into play and encouraged, and the individual seems swept by intense feelings." See also the findings reported in Handel, Hollywood Looks at Its Audience, as to attitude shifts especially when the cumulative effect is appraised, at pp. 182, 202 and 203.

[11] Blumer, Movies and Conduct, pp. 56 and 67—"The delinquent boy who witnesses some clever manner of burglarizing might be counted on having some disposition to use it if it offers possibilities of serving his own interests."

[12] Ibid., p. 103.

[13] Ibid., pp. 124 and 125.

[14] Departments of the Army and Navy, Instructional Film Research 1918-1950, Technical Report No. SDC 269-7-19 at p. 5—14, "High school

To this presentation of audience and great impact it can be said, and with truth, that the extraordinary quality of the expression demands extraordinary protection. But the essential ingredient must be considered. **The audience, the impact, the effect, must be put in combination with motion pictures which are obscene, immoral or which tend to promote crime or riot.** That combination and only that combination presents the threat, the danger, and the area of Ohio's protection. That area is best described by Ohio's experience under the statute in question. Stipulation No. 8 (R., 13) in this cause shows the statistical experience of this licensing system for the past decade. Almost 18,000 motion pictures have been approved and distributed in Ohio. Fifty-nine have been rejected. Of these latter fifteen were later approved. In ten years forty-four films remained unlicensed. This might suggest some lack of diligence on the part of appellee. It cannot suggest the wholesale slaughter of motion picture expression.

The Court, bearing in mind the combination of audience, impact and effect, must consider the catalytic agents. The following are representative examples of motion picture films rejected by appellee together with the reasons for rejection as reported on the official certificate of rejection. Certificate No. 336, "Human Beast" (French), harmful because of extreme horror, 12-16-44; Certificate No. 339, "Apology For Murder," immoral and harmful because

---

and college students who saw The Criminal Code were less favorable toward punishment of criminals after seeing the film. . . . Thurstone and Peterson reported that 88% per cent of the effect persisted after two and a half months, and 78 per cent persisted after nine months." "When three films dealing with crime and criminals, (Big House, Numbered Men and Criminal Code) were shown to 745 students from grades six through twelve, the magnitude and reliability of attitudinal effects were greatest when the films were shown cumulatively. This effect remained constant after two months, and appeared to increase after four months."

furnishes detailed plans for commission of murder, 10-19-45; Certificate No. 348, "Sinful Love," harmful because scenes in house of prostitution, 6-6-47; Certificate No. 351, "Tomorrow's Children," harmful because of illegal sterilization operation, 11-3-47; Certificate No. 352, "Refer Madness," harmful because shows use of marijuana, 11-20-47; Certificate No. 362, "The Pace That Kills," harmful because depicts narcotic traffic, prostitution, illicit intercourse, 5-2-49; Certificate No. 366, "The Room Upstairs" (French), harmful because condones and justifies immoral living; Certificate No. 368, "My Last Mistress," harmful because encourages a life of loose morals in the relationships of men and women, 11-8-49; Certificate No. 376, "Kiss Tomorrow Goodbye," harmful because of sordid, sadistic presentation of crime with explicit steps in commission, 8-15-50; Certificate No. 377, "French White Cargo" (French), harmful and immoral because deals excessively with prostitution and white slavery, 12-1-50; Certificate No. 383, "The Devil's Sleep," harmful because depicts open narcotic traffic among teen agers with technical names of narcotics used, methods for use and effects to be obtained, 9-5-51; Certificate No. 389, "Love Moods—Bubble Bath," harmful because of nudity displayed, 3-17-52; Certificate No. 393, "Devil In the Flesh," harmful because presents a minor child in a sexual relationship with a married woman, 12-2-52; Certificate No. 394, "Gigi" (French), harmful because adults glorify illicit living while grooming a young girl for life as a mistress, 12-23-52; Certificate No. 356, "Street Corner," harmful because of abortion theme, 5-21-48. Appellant takes the position that the Ohio legislature cannot under any circumstances prevent any of these motion pictures from being exhibited in Ohio. This position obviously must contemplate the effect which each

would have upon certain elements of the unrestricted audiences.[15] It must also contemplate the effect of those motion pictures which would be exhibited in the absence of a statute, which were never presented in the face of one. Knowing the effect and the nature of the audience, is there any question of the threat posed by "I Could Not Marry" which portrays an incestual relationship between brother and sister as well as prostitution, or by "Prison of Dreams" the theme of which deals with prostitution, with actual bed scenes and a central character presenting the philosophy that there was little use in trying to improve her low moral state.[16] Appellee submits that the legislature, conscientiously considering the factors here set forth, can conclude that the controversial problems of "Pinky" must have access to the minds of Ohio's adults and children but it also can inescapably conclude that the danger inherent in the obscenity of "Sinful Love", the immorality of "My Last Mistress", the dangerous criminal aspects of "Apology For Murder" and "M" compels a limitation on the right to expression. The proven potential for good outlined by appellant surely substantiates the right. The proven potential for harm spells its limitations.

---

[15] Consider the effect in relation to the following conclusion. Blumer, Movies and Conduct, p. 196, "These considerations establish motion pictures as an incitant to conduct as well as a pacifier of feelings. It is insufficient to regard motion pictures simply as a fantasy world by participating in which an individual softens the ardor of his life and escapes its monotony and hardships, nor to justify their content and 'unreality' on this basis. For too many pictures are authentic portrayals of life, from which they draw patterns of behavior, stimulation to overt conduct, content for a vigorous life of imagination and ideas of reality. They are not merely a device for surcease; they are a form of stimulation. Their content does not merely serve the first purpose, but incites the latter result. What might be intended to have the harmless effect of the former may, on occasion, have the striking influence of the latter." (Emphasis added)

[16] Henry James Forman, Our Movie Made Children, p. 212, "49% or virtually half of a sample of 100 inmates of a penal institution investigated (by the Blumer-Hauser study) testified that movies gave them the desire to carry a gun." See also Blumer and Hauser, Movies, Delinquency and Crime, Payne Fund Studies, at p. 202.

Recognition of this potential for harm or this area of danger is not confined to the legislature of Ohio. Two of the other most populous states, states incidentally that have been more than sensitive to civil liberties, have acted similarly in protecting their interests.[17] Parliaments which have for years been in the forefront of all battles for liberty have followed suit.[18] The court which has had more experience than any other with this problem has stated its conclusion as,

> "A single motion picture may be seen simultaneously in theatres throughout the State. May nothing be done to prevent countless individuals from being exposed to its vicious effects? To us the answer seems obvious, especially in the light of recent technical developments which render the problem more acute than ever. Now we have commercially feasible three dimensional projection, some forms of which are said to bring the audience 'right into the picture'. There can be no doubt that attempts will be made to bring the audience right into the bedchamber if it be held that the State is impotent to apply preventive measures." **Commercial Pictures Corp. v. Board of Regents**, 305 N. Y. 336, 113 N. E. 2d 504.

It is thus clear that an impressive body of authority, including some of the most responsible legislative houses, has acted upon the conclusion that the motion picture—its audience, its impact, its effect and the subjects it can deal with, represents a clear danger to the social and moral order. Surely the Fourteenth Amendment does not compel a state to come to an opposite conclusion.

Moreover the motion picture industry itself recognizes this danger. That industry was forced to adopt in 1930 a

---

[17] McKinney's Consol. Laws N. Y. Ann., Educational Law, A. 8, Sec. 126; Purdon's Penn. Stat. Ann. T. 4, Sec. 46.

[18] Cinemagraph Act, 1909, 9 Edw. 7, C. 30; Cinemagraph Act, 1952, 15 and 16 Geo. 6 and 1 Eliz. 2, C. 68; Canada, Province of Ontario, The Theatres Act, 1953, 2 Eliz. II, C. 104; "Commonwealth of Australia, Customs Act 1901-1953, regulations made pursuant to this act are found in Statutory Rules 1932, No. 24 as amended by statutory rules 1945, No. 125 and Statutory Ruler 1949, No. 17."

Code of Production Standards.[19] The major portion of this self regulatory device is concerned with obscenity, immorality and crime.[20] If the conclusions of legislatures, courts and research are erroneous, what of this great emphasis by the industry itself. Lest it be assumed that the Code is the answer, consider the evaluation expressed in Powdermaker, **Hollywood, The Dream Factory**, p. 57:

> "Discounting the window-dressing of the noble-sounding preamble, it can be further questioned whether the Code succeeds in its specific restraints on sex, crime and violence. . . . But although the MPAA Code of taboos is more or less obeyed, everyone inside and outside of Hollywood knows that sexiness is a prime requisite for all actors and for most movies, and that crime and violence dominate a very large number of them."

As a sample of the experience of a private evaluating body during the period of the Code, the same publication at p. 68 points out that the percentage of films given the approved rating by the National Legion of Decency during the period 1936-1949 declined from 61% to 41.33%. These remarks are especially significant in that they originate from a source friendly to the industry. Far from solving the problem the Code but demonstrates it. Many motion pictures are not even subject to the Code. Though statistics are not available for Ohio, **The Film Daily**, July 7, 1952, p. 6, points out that not more than 50% of the pictures presented to the New York State Motion Picture Division have been approved by the Code. The same holds true for foreign production. Dr. Hugh M. Flick, Director of the New

---

[19] Hortense Powdermaker, Hollywood The Dream Factory, p. 57; The entire Code is set out at p. 964, The Film Daily Yearbook 1953.

[20] Note particularly Item I, Crimes Against the Law, Item II, Sex, Item IV, Obscenity. Note also the lengthy treatment of crime in the Special Regulations.

York State Motion Picture Division states his experience in the **Saturday Review**, Nov. 22, 1952 at page 52:

> "Foreign films are our biggest problem children, mainly because different countries are bound to have differing moral standards; what shocks us wouldn't shock them, and vice versa. We examine at least five hundred foreign pictures a year—including the Arabian delicacies that run on for twenty reels."
>
> "We discovered that some of these movies, supposedly crying alarm over the spreading use of narcotics, were graphic enough to show the proper method and the best place on the arm for inserting the needle. There's some question over whether 'H is for Heroin,' a documentary made with high purposes, couldn't also have—in the long run—an adverse effect."

Motion pictures of the kind which may be rejected under the Ohio statute pose a threat to our community which is generally recognized on all sides. Other states have and have not concerned themselves with the problem. We take it that the Fourteenth Amendment does not enjoin uniformity in the attack upon local problems. It may also be that all of the states benefit by the safeguards in New York, Pennsylvania and Ohio. A motion picture which could not be marketed in that area would certainly have problems with its balance sheet. To reiterate the basic position—no one factor alone justifies the narrow exception to freedom of expression. Freedom is the rule, but the combination of unrestricted audience, titanic impact, known effect, and obscene or immoral subjects, or subjects which tend to promote crime or riot creates a limitation upon the freedom.

C. The Limitation on Freedom of Motion Pictures May Be Constitutionally Enforced By the Denial of a License to Motion Pictures Which Are Obscene, Immoral or Which Tend to Promote Crime or Riot.

The frame of reference into which the Ohio statute falls has been succinctly established by three sources—this Court, the Court of Appeals of New York and one who has written on behalf of the motion picture industry.

> "It has been well observed that such utterances (lewd, profane, obscene) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." **Beauharnois v. Illinois**, 343 U. S. 250 at 256.

Thus the Court concluded that prevention and punishment of such utterance was within the constitutional power of the state.

> "Of course it is true that the State may not impose upon its inhabitants the moral code of saints, but, if it is to survive, it must be free to take such reasonable and appropriate measures as may be deemed necessary to preserve the institution of marriage and the home, and the health and welfare of its inhabitants." **Commercial Pictures Corp. v. Board of Regents**, 305 N. Y. 336, 113 N. E. 2d 504.

> "Freedom, on the other hand, is not synonymous with complete lack of regulation. And a free screen does not include obscenity, indecency, lying, or fraud, either in principle or in constitutional practice." Ruth A. Inglis, **Freedom of The Movies**, p. 172.

The most recent statement by this Court of the interests to be evaluated where freedom of expression is in issue was made in **Dennis v. U. S.**, 341 U. S. 494 at 510:

> "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase (clear and present

danger) as follows: 'In each case (courts) must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule."

Except for the recognition of the special nature of motion pictures given in the **Burstyn** decision, this Court has not had the opportunity to evaluate the significance of the material set out under Point II B, supra. It has weighed other dangers confronting both the state and national governments. Some of these are much more serious than that presented in the instant case. Some are much less serious. In **Dennis v. U. S.**, supra, the Court permitted the Congress to conclude that a Communist conspiracy was such a threat that advocacy of a political belief could be made a crime. In **Communications Association v. Douds**, 339 U. S. 382, 390, 391 the Court in effect upheld a prohibition of political views on the ground that Congress could rationally find the evil of Communist inspired labor discord so great as to warrant the prohibition.

> "The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions." **Communications Association v. Douds**, supra, at 401.

The process of evaluation which the Court must follow in these situations is best described in that opinion at pp. 399, 400:

> "On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and in some of its manifestations, restrain the exercise of First Amendment rights. (Citing cases) In essence, the problem is one of weighing the probable effects of the statute upon the free exercise

> of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by Sections 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' **Schneider v. State**, 308 U. S. 147, 161 (1939)."

The effect of the Ohio statute then must be put into the balance with the determination, resulting from forty years of experience, not that commerce is threatened but that substantial harm will befall the social and moral order of our state. It is especially significant that the prohibition which was upheld in **Douds**, supra, because of the substantial harm which might be caused to interstate commerce, was an infringement not upon the broad command of the Fourteenth Amendment, but upon the specific mandate of the First Amendment. The states are surely entitled to as much, for as Justice Holmes pointed out in **Gitlow v. New York**, 268 U. S. 652, 672:

> "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, **although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress** by the sweeping language that governs or ought to govern the laws of the United States." (Emphasis added)

A comparison of the evil attacked by the Ohio statute and that which justified the prohibition upheld by this Court in **United Public Workers v. Mitchell**, 330 U. S. 75, demonstrates the constitutional framework within which Ohio has acted. In expressing the rationale of the **Mitchell**

decision the Court in **Communications Association v. Douds**, supra, at pp. 404, 405 said:

> "In **United Public Workers v. Mitchell**, supra, we upheld a statute which provided that employees of the Federal Government could not participate in partisan political activities, **concededly a First Amendment right**, if they would retain their positions. The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will. For it was recognized that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take an active part in missionary work.' 330 U. S. at 100. **But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgement of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment.**" (Emphasis added)

For the sake of contrast let us recast appellant's argument in the light of the **Mitchell** decision. Ohio under the Fourteenth Amendment cannot prevent an evil directed at the very social fabric of the community. This prevention does not concern discussion of public issues, or debate of political programs, it concerns only the obscene, the immoral or that which tends to promote crime or riot. On the other hand Congress under the First Amendment may prohibit that which is the keystone to our governmental process—political activity by the individual. And the great evil which justifies this action is the threat of an inefficient government service. If the Fourteenth Amendment can accomplish this absurdity then the anxiety of Justice Holmes was not expressed strongly enough.

> "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given

> to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." **Baldwin v. Missouri**, 281 U. S. 586 at 595.

Other guideposts to the "evils" which justify legislative restraints on basic rights are to be found in **Reynolds v. U. S.**, 98 U. S. 145; **Davis v. Beason**, 133 U. S. 333; **Jacobson v. Mass.**, 197 U. S. 30; **Fox v. Washington**, 236 U. S. 273; **In Re Summers**, 325 U. S. 538; **Chaplinsky v. New Hampshire**, 315 U. S. 568; **Feiner v. New York**, 340 U. S. 315, and **Beauharnois v. Illinois**, 343 U. S. 250.

Obviously none of these decisions marks the exact boundary for motion pictures for each is composed of differing forms of expression, regulation and interest, and as Justice Jackson observed in his dissent in **Kunz v. N. Y.**, 340 U. S. 290 at 307:

> ". . . the vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."

The form of communication most nearly similar in impact to the motion picture would probably be television. It is worth noting the vulnerability to community control which this Court has permitted the federal government in this field. While the Communications Act specifically denies censorship, 47 U. S. C. Section 326, these are words which could be incorporated in any previous restraint legislation. Not the words but the effect is critical. The power to grant or deny licenses and renewal of licenses is given the Federal Communications Commission. 47 U. S. C. Sec-

tion 307 (a). The standard by which applications for issuance or renewal is to be judged is "the public interest". The Commission may revoke licenses if the operation is "not in the public interest". 47 U. S. C. Section 312 (a) 2. This standard has been upheld by this Court. **National Broadcasting Co. v. U. S.**, 319 U. S. 190. The effect of these provisions, bluntly put, is program control. Having acquired a license the licensee continues to exercise his freedom of expression only if his programing meets the Commission's notion of the "public interest". If it does not, revocation or denial of renewal follows.[21] This is effective control; yet the impact of television is less threatening than the motion picture for it operates under entirely different circumstances. If anyone should doubt that this constitutes a most effective previous restraint, consider how Ohio could utilize the same approach. Each theatre would be licensed. At the end of each year renewal would be required. The license would be renewed only if the theatre had served the public interest. To determine whether the public interest had been served, an administrative agency would review the motion pictures shown and would not measure them by the narrow standard now used but by "the public interest". Throughout the year the power of revocation would utilize the same procedure. The Court of Appeals had no doubt about the purpose of this system:

> "The Act (Communications Act) itself demonstrates that **Congress was vitally concerned with the nature of the programs broadcast as affecting the public good.** It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. **Congress thus set up a species of 'program control' far broader and more effective** than the antique

[21] See footnote 26, 39 Columbia Law Review 450 for a collection of renewal applications which have been denied.

> method of censorship which Pennsylvania endeavors to effectuate in the instant case." (Emphasis added) **Dumont Laboratories v. Carroll**, 184 Fed. 2d 153 (C. A. 3) at 156; cert. den. 340 U. S. 929.

or again at the same page:

> "It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcasting stations including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. **Program control was entrusted to the Federal Commission and it is an effective one.**" (Emphasis added)

The purpose of this analysis is only this: The federal government has shown its vital concern with a medium of communication the impact of which is similar to but not so great as the motion picture. It conceived the evil to be exactly that which concerned Ohio. It legislated to prevent that evil. The remedy prescribed is much broader than that undertaken by Ohio. It has done these things constitutionally in the eyes of this Court. Ohio is similarly entitled.[22]

In summary, the Ohio legislature determined that certain motion pictures presented a serious threat to the social fabric of Ohio.[23] This threat arose from the nature of the

---

[22] Justice Jackson has contrasted federal and state power to deal with these problems in his dissenting opinion in **Beauharnois v. Illinois**, 343 U. S. 250 at 295.

[23] This determination was reaffirmed by the legislature while this case was pending. A bill to repeal the act, S. B. 159, was defeated in committee. Bulletin, 100th General Assembly, State of Ohio, Twentieth (Final) Edition.

motion picture—the impact, the effect, the unrestricted audience,[24]—and the nature of certain subjects which they might present. Other legislatures, other nations, other courts, competent research, and even the federal government determined that the same evil existed. Opposite conclusions may be reached. Appellant's position argues for such, but that argument has no place before this Court. As Justice Frankfurter forcefully put it dissenting in **Winters v. New York**, 333 U. S. 507 at 526 and 527:

> "No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate. But he must be a bold man indeed who is confident that he knows what causes crime. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the various alleged 'causes of crime' " . . .
>
> "The painful experience which resulted from confusing economic dogmas with constitutional edicts ought not to be repeated by finding constitutional barriers to a State's policy regarding crime, because it may run counter to our inexpert psychological assumptions or offend our presuppositions regarding incitements to crime in relation to the curtailment of utterance. This Court is not ready, I assume, to pronounce on causative factors of mental disturbance and their relation to crime."

See also **Dennis v. U. S.**, 341 U. S. 494 at 540.

Having ascertained the area of danger, the legislature moved to meet it. They appreciated, as have most others, that if they were to strike at the root of the evil they could not wait till the threat had matured and attained its inevitable effect. A motion picture with tremendous impact can be shown to a completely heterogeneous audience in a

[24] Note that an individual may view any film he choses without license. It is only the public exhibition which developes the threat. Ohio Gen. Code Section 154-47d.

darkened theatre in every town in Ohio on every night of the year. To suggest that only post exhibition control can be exercised is to allow the damage to be done and to base control on a somewhat exaggerated confidence in the ability of law enforcement to be effective on so wide a scale. The action of the legislature established a very limited examination of motion pictures before they have the opportunity to hurt. This action fit into a pattern of control which is exercised by other states, other nations, and by the federal government, too. Administration was put in the hands of a responsible state agency rather than narrow local officials. Ohio, conforming to the mandates of this Court, has done everything possible to act according to those mandates in the last forty years. Having relied on the decision of **Mutual Film Corp. v. Ind. Comm. of Ohio**, 236 U. S. 230, the Supreme Court of Ohio nevertheless strictly limited the application of the statute in obedience to **Burstyn v. Wilson**, supra. It is difficult to conceive of state action more consistent with the Fourteenth Amendment. Of course there may be disagreements on the specific facts of this case,[25] but that is hardly a question for this Court after four administrative determinations and confirmation of those determinations by the highest court of the state.

---

[25] It is worth noting that both Australia and Ontario insisted on numerous eliminations in "M" before admitting it. Commonwealth Film Censorship, Statement July 1951, p. 2; Board of Censors of Motion Pictures, Ontario, Report of May 1-May 31, 1951, p. 1.

There was no sign of hasty action on the application of "M". Four distinct viewings before administrative staff and advisory board convinced all that it would seriously affect crime in Ohio. The brutality, the mob scenes, the abduction of children gave cause for alarm. In many respects it is questionable whether the movie complies with the spirit of the Motion Picture Production Code. Note I (1) b (Brutal killings) and (2) a (methods of crime), the latter in view of the instructions on how to prevent the alarm system from operating and how to properly cut into the jewelry store; note also XII (3) (Brutality and possible gruesomeness) and especially the Special Regulations on Crime in Motion Pictures, (3) Excessive brutality, (11) Kidnapping of young children.

The validity of this entire proposition is aptly put by the Supreme Court of Ohio at p. 327:

> "There can be no inherent right to publicity which tends to destroy the very social fabric of the community, and consequently in such instances there is no right of free speech. In these times of alarming rise in juvenile delinquency and of increasing criminality in this country, attributed by social agencies at least in part, to the character of the exhibitions put on in the show-houses of the country, criminal prosecution after the fact is a weak and ineffective remedy to meet the problem at hand. In the war against crime and delinquency there must be some effective defensive weapons against immoral publicity, whereby the social fabric may be protected as it is by law from other methods of attack."

POINT III.

The Standards Upon Which the Ohio Licensing System is Based Are Sufficiently Definite to Satisfy the Requirements of Due Process Under the Fourteenth Amendment to the United States Constitution.

To properly establish a frame of reference as to the precise question before the Court, let us first consider what is **not** before the Court. This is not a case in which the standards must be rigorously tested so that they give proper notice of the exact limits of the forbidden act to a possible offender. Those limits could not be more plain. The forbidden act is the public exhibition of a motion picture without a license. No doubt or misunderstanding can attach to such a boundary. Nor are the standards for revocation a guide to decision. As pointed out supra revocation must be based upon the same grounds as denial of a license in the first instance. By what tests then are we to measure the standards, and what is to be measured? The exact question before the Court is: **Do the standards provided furnish the Supreme Court of Ohio with a sufficiently definite test so that it can accord proper review of the determination made by the administrative body?** As Justice Frankfurter observed in his concurring opinion in **Burstyn v. Wilson**, supra, at page 532:

> ". . . Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways . . . Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacrilegious,' the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, sub-

jective determinations. Thus, the administrative first step becomes the last step."

Thus the Court below was confronted with a question which it is peculiarly competent to answer. Under the law of Ohio it is the only court furnishing judicial review of appellee's determinations. The Court, therefore, had to determine if the standards provided by the legislature were sufficient to allow it to properly review those determinations. **If the Court can accord adequate review, then the standards satisfy due process.**

The standards to be measured by this rule were defined by the Court below as pointed out under Point II, A (1) supra. Only those films which are obscene, immoral or which tend to promote crime or riot may be denied a license. The Supreme Court of Ohio held that under these standards it could adequately review the administrative determinations brought before it.

At the outset it is important to remember that the specific language of the statute has been approved by this Court on each occasion that it has given it attention—and this approval did not even consider the restrictive interpretation which has now been given. In **Mutual Film Corp. v. Industrial Commission of Ohio**, 236 U. S. 230, the Court held that the standards of this statute did not leave decision to arbitrary judgment, but were found to get precision from the sense and experience of men. This branch of the **Mutual Film** decision was not overruled by the **Burstyn** case. In fact, Justice Frankfurter, with whom Justices Burton and Jackson joined, in striking down the standard "sacrilegious," contrasted that indefinite term with the standards of the Ohio act:

> "* * * Even in Mutual Film Corp. v. Industrial Comm. of Ohio * * * it was deemed necessary to

find that the terms 'educational, moral, amusing or harmless' do not leave 'decision to arbitrary judgment.' Such general words were found to 'get precision from the sense and experience of men'. * * * This cannot be said of 'sacrigelious.' If there is one thing that the history of religious conflicts shows, it is that the term 'sacrilegious'—if by that is implied offense to the deep convictions of members of different sects, which is what the Court of Appeals seems to mean so far as it means anything precisely—does not gain 'precision from the sense and experience of men' * * * Well equipped law libraries are not niggardly in their reflection of 'the sense and experience of men,' but we must search elsewhere for any which gives to 'sacrilege' its meaning." **Burstyn v. Wilson**, supra, at 519.

The difference is apparent, "sacrilege" is a term the meaning of which has been a source of conflict through the ages. "Obscene," "Immoral," "Tends to promote crime or riot" have been fixed. A like expression of approval of that branch of the **Mutual Film** decision with which we are here concerned was made in **Winters v. New York**, 333 U. S. 507 at 518. The Court there contrasted the indefinite statute before it with those instances where definiteness flowed from the whole general nature of the act. As an instance of the latter it cited the **Mutual Film** decision. See also Justice Frankfurter's dissenting opinion in **Winters v. New York**, 333 U. S., 507 at p. 520.

The terms by which the Court below defined the statute are neither novel nor unique. Their meaning seems to be quite well understood for they, or words substantially like them, are almost shop worn. The following examples indicate the frequency of this type of expression:

1. Section 13040, Ohio Gen. Code (2905.40 R. C.): ". . . lascivious, indecent, immoral or impure picture or figure or a picture of crime or lust or a picture tending to corrupt morals . . ."

2. 18 U. S. C. Section 1462 (a): "any obscene, lewd, lascivious, filthy . . . motion picture film" ". . . or other matter of indecent character . . ."

3. 19 U. S. C. Section 1305: prohibits importation of obscene or immoral books etc.

4. Section 486-17a, Ohio Gen. Code (143.27 R. C.): immoral conduct is ground for dismissal from classified service.

5. Section 1261-1b, Ohio Gen. Code (6111.01 R. C.): Pollution is a discharge of certain wastes which "renders such waters harmful or inimical to public health . . ."

6. 18 U. S. C. Section 552: ". . . or other articles of indecent or immoral use or tendency . . ."

7. Motion Picture Production Code: "moral standards" "crime, wrongdoing, evil or sin" "do not stimulate the lower and baser emotions" "treatment of low, disgusting, unpleasant, though not necessarily evil, subjects"

These are but examples of how those who define speak in this field. In addition it is well to point out again that this Court has sanctioned a standard more indefinite than any of these by upholding the test of "public interest" in the Communications Act. **National Broadcasting Company v. U. S.**, 319 U. S. 190. This Court has restated the "sense and experience" test many times. Chief Justice Hughes writing in **Sproles v. Binford**, 286 U. S. 374 at 393 stated it:

> "The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding."

The Court below construed ordinary terms of the statute in issue and gave exact definition to their scope. The observation of the Court at p. 332 of its opinion spells the breadth of its consideration when it asserts, in conformity

with appellee's position, that not one film rejected in the past decade has fallen outside the boundaries it has set. Nor does "M" violate these standards. It was felt that the effect of this motion picture on children and on persons with distorted or perverted characteristics would directly and adversely affect the crime and delinquency problem in Ohio. There is ample evidence in the motion picture to sustain this judgment. The favorable portrayal of the underworld, the brutal scenes of murder, of mob hysteria, of the killer's bloody hands, the methods of abduction, the method for cutting open the jewelry store, the method for gaining admission to the building, the method of "taking care" of the alarm system—each of these in the judgment of the administrative agency and in the judgment of the Court below—and all in combination, produced a danger against which Ohio should have the right of self defense without waiting for the havoc to be wrought.

When, as here, the only test of due process of law with which we are concerned is the adequacy of judicial review, it is also significant that under the statute attacked, the Court's review function is not limited to a determination of whether there is reliable or probative evidence to sustain the order of the appellee. The Court, upon examination of the record, must actually determine the reasonableness of the order. Section 154-47h, Ohio Gen. Code. There could be no more complete judicial review. Nor is it possible in this instance for "the administrative first step to become the last step * * *".

With standards which have attained the clarity of those before the Court, and with judicial review so broad in scope, there can be no violation of due process of law. Nor is there any under this statute.

POINT IV.

The License Fee Provided For By Ohio Law Does Not Constitute as to This Appellant an Unconstitutional Tax Upon the Right to Exhibit or Distribute Motion Pictures.

A. THE COURT BELOW PROPERLY ESTOPPED APPELLANT FROM ASSERTING THE INVALIDITY OF THE LICENSE FEE IN THIS ACTION AND THIS COURT HAS NO JURISDICTION OF THAT QUESTION FOR THE REASON THAT THE JUDGMENT OF THE SUPREME COURT OF OHIO IS BASED UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

Appellant voluntarily tendered the fee in question to the State of Ohio. It made no protest of that payment. Appellant did not seek in this action to recover the fee. Nor did it take advantage of its obvious remedy under Section 12075, Ohio Gen. Code, to enjoin the levy, if as it claims there is a levy, or to recover back that which it claims was illegally exacted. The State of Ohio did not claim that appellant owed it further payment. Essentially, appellant presented a hypothetical question to the Court below without taking advantage of its normal remedies. At p. 335 of its opinion, the Court below disposed of this question by an exact application of a very simple principle of Ohio law:

> "Besides the plaintiff paid the fee for inspection without protest and does not seek its recovery. Neither has it enjoined the levy of the fee as it could do, if it were illegal, under the provisions of Section 12075, General Code. Under such circumstances, **the plaintiff is estopped in this action to complain on this point.**" Citing cases. (Emphasis added)

The Court did discuss the merits of the fee system, but the estoppel is clear. Ohio law is well settled on this principle. **State on Application of Alter v. Bader et al.**, 56 O. S. 718.

B. In Any Event, the Fee Provided By Ohio Law is a License Fee, Not a Tax, and If the Right to License Exists, the Right to the Fee is Corollary Thereto.

There is no dispute but that if the right to license exists the right to a proper license fee exists if provided by law. Appellant asserted that the revenue produced by Section 154-47, Ohio Gen. Code, so greatly exceeds the cost of the license system as to constitute a tax.

Whether a fee is license or tax is a matter of legislative intent and ordinarily courts will not interfere with a licensing program on the ground that the amount collected is unreasonably large unless clear proof of grossly excessive collections is made. **Globe Security & Loan Co. v. Carrel, Aud.**, 106 O. S. 43, 48. Legislative intent can be gathered from the language of the statute. In this instance the exaction has been designated a fee, and the expenses of the licensing program are to be met from the revenue produced. Section 154-47a, Ohio Gen. Code. It is not decisive of the question that the legislature in Section 154-47a, Ohio Gen. Code, provided for an allocation of any possible surplus revenues. The revenue could not be measured with exactness and there is no constitutional prohibition against allocating that surplus which might be produced. Inasmuch as all revenues are paid to the general fund, and the expenses of the licensing system are provided year by year by legislative appropriation, those expenses could increase in any given year so that no surplus would exist and Section 154-47a would be meaningless. Therefore the mere fact of allocation, not being prohibited, and resting year by year on legislative discretion for meaning cannot be decisive of the question.

What of the surplus revenues? In determining the significance of these we must begin with the discussion of the Supreme Court of Ohio at p. 335 of its opinion:

> "It should be observed, however, that the cost of operation of the division does not reflect other heavy governmental and facility costs incidental to the operation of the division. The state is obliged to furnish housing and other facilities as well as the service of the legislative and judicial branches of the state government in carrying on the license system, the cost of all of which is outside the operational cost of the division. See **Globe Security & Loan Co. v. Carrel, Aud.**, 106 Ohio St. 43, 48, 138 N. E., 364."

Thus the precise dollar balance between income and expenditure is not the test, but the over-all picture presented. The legislature cannot be charged with the duty of precise estimation of revenues from licenses for years to come.

In this case the legislature established a licensing system and a fee incidental thereto. By what standard was the legislature to determine the fee which would be necessary? If they looked to states with similar experience they would find the following: New York, $3.00 per reel—1200 ft. or less and $2.00 per reel for duplicate prints, McKinney's Consol. Laws N. Y. Ann., Educational Law, A.3, Sec. 126; Pennsylvania, $2.00 per reel—1200 ft. or less and $2.00 per reel for duplicate prints, Purdon's Penn. Stat. Ann., T.4, Sec. 46. These fees compare with Ohio's $3.00 per reel—1200 feet or less and $3.00 per reel for duplicate prints. Surely the difference of $1.00 a reel does not indicate an attempt to find a great new field of revenue for the Ohio tax system. On the contrary, this comparison indicates a pattern of license fees which Ohio has but followed.

Nor is the surplus so great as the auditor's computations tend to show. As the Court below points out may, the

legislature not calculate expenses which will not be shown by the annual appropriation? May it not provide a fee which will amortize the cost of an extensive suite of offices in a modern office building? May it not provide for amortization of the cost of construction of a theatre in that same building? May it not calculate the yearly charges for light, heat, water, and janitorial service? None of these expenses is included in the appropriation expenses set forth in Stipulation No. (6) (R. pp. 11, 12, 13). Is there any question but that these expenses are real and that they would substantially reduce the surplus of revenues shown? Too, could not the legislature divert the surplus funds represented by these expenses as they have done in Section 154-47a, General Code, without thereby changing the nature of the fee from license to tax?

The legislature has designated the exaction a fee; it has followed a pattern of license fees in sister states; the expenses when completely estimated reduce the surplus to an insignificant item of state revenue. This is not the clear case of taxation which this Court demands. **Clark v. Paul Gray Inc.**, 306 U. S. 583, 599. The fee is a part of the licensing system, and if the right to license exists the fee should be sustained.

C. Even If the Fee Provided By Section 154-47 Be Characterized as an Unconstitutional Tax, That Provision is Severable and Its Failure Does Not Affect the Validity of the Licensing System.

It is well established that parts of an enactment, when capable of separation, may be valid and effectual, while other parts may be void by reason of their repugnancy to a constitutional provision. **Eilenbecker v. District Court**, 134 U. S. 31. The tests of severability are usually stated as follows: The provision must be capable of separation. Re-

moving the unconstitutional provision must not strike out the fundamental purpose of the enactment. Insertion of words or terms must not be needed to give effect to that portion remaining. Severability is also allowed when it can be said that the legislature, perceiving the defect, would have enacted the remainder. It is evident that these tests are only means of ascertaining the legislative intent. **Champlin Ref. Co. v. Corporation Commission,** 286 U. S. 210; **Southwestern Oil Co. v. Texas,** 217 U. S. 114.

In this case there can be little doubt. Is the central purpose of the enactment to charge a fee or to license motion pictures? If not the latter, then why not a simple tax instead of a complete administrative establishment? The licensing system is entirely separate from the license fee. The fee is but an incidental, and can stand or fall without affecting the critical and fundamental purpose of the act. Nor is any addition of terms needed. It necessitates a perversion of the whole spirit of the act to make more than an incidental out of the fee. If the failure of the fee is to be the failure of the statute, then the failure of the revenue produced by the fee must strike down the whole statutory provision for the Division of Visual Education. Section 154-47a. The one result is as foolish as the other is absurd.

This Court should apply to this case the rule, that if when the unconstitutional part is omitted, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. See **2 Sutherland, Statutory Construction** (3rd Ed.), Sections 2405, 2407. The same can be said here, and the statutory provision for licensing should be sustained irrespective of the fate of the fee.

CONCLUSION.

As argued in appellee's statement in opposition to jurisdiction, we do not regard the equal protection question to be before the Court. Be that as it may, the position taken in this brief would provide an equally sound basis for classification of the motion picture as a special threat demanding special measures of prevention.

The basic position of appellee on the constitutional issue of the power of the state to license is well summarized in **Beauharnois v. Illinois**, 343 U. S. 250 at 262:

> ". . . Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues."

The same reasoning must certainly apply to a state's very limited defense of its social and moral order. Forty years of regulation in Ohio has never been regarded as inconsistent with basic liberty. It should not be so regarded now. The judgment of the Supreme Court of Ohio is within the constitutional framework erected by this Court, is therefore without error, and should be affirmed.

Respectfully submitted,

C. WILLIAM O'NEILL,
Attorney General, State of Ohio,
ROBERT E. LEACH,
Chief Counsel,
GWYNNE B. MYERS,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Appellee.